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Supreme Court of the United States

October Term, 1945

No. 537

WAYNE THOMAS LONERGAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Proceedings Below

The petitioner was convicted of the crime of MURDER IN THE SECOND DEGREE (Penal Law, § 1046) on April 17, 1944 in the Court of General Sessions of the County of New York (14).* The judgment of that court was unanimously affirmed without opinion by the Appellate Division of the Supreme Court (269 App. Div. 662) and by the Court of Appeals of the State of New York (294 N. Y. 942). The proceedings in the courts below are accurately set forth in the petition under the headings "Jurisdiction of This Court" (pp. 1-2) and "(a) Introductory Statement" (pp. 3-4).

* Unless otherwise indicated, references are to pages of the printed record.

Nature of Case and Question Presented

The petitioner stands convicted of the murder of his wife. Although the circumstances of the killing and the petitioner's conduct thereafter made it clear—as a matter of fact—that the petitioner was the killer, there could—as a matter of law—have been no conviction without the confession the petitioner made to an assistant district attorney, which confession was received in evidence at the trial.

The question here presented is whether any constitutional right of the petitioner was violated by the trial court's ruling admitting that confession in evidence.

Preliminary Statement of Evidence Bearing on the Killing

The dead body of Patricia Burton Lonergan was found lying on her bed at about eight o'clock on Sunday evening, October 24, 1943 (128-9, 142-5, 185). An autopsy disclosed that she had met her death as the result of assault and strangulation (70, 78-80, 99, 101). Suspicion was immediately directed at her husband, the petitioner, who had been separated from his wife for some time (245, 549, 571) and who was then serving with the Royal Canadian Air Force in Toronto (242-3, 548, 574). He was, accordingly, taken into custody by the Toronto authorities at about eight o'clock on the following morning, Monday, October 25 (427, 431).

When taken into custody, the petitioner was dressed in civilian clothes and was observed to have scratches on his face (Exhs. 15 and 16)—which scratches were ultimately shown to have resulted from the fatal struggle with his wife (555, 578).

That evening he gave a voluntary statement to an assistant district attorney of New York County in which

he denied any implication in the murder (240-87). He sought to account for his civilian clothes and the scratches on his face by saying that on the night before his arrest he had met a soldier, Murray Wooster, who had gone with him to the apartment of a friend and indulged in homosexual relations, and who had, thereafter, absconded with the petitioner's uniform, wristwatch and wallet (272-6).

Subsequently, after having been returned to New York, he repudiated his story about the alleged homosexual relations and formally confessed that he had killed his wife.

The petitioner's confession described in the minutest detail his activities before, during and after his fatal encounter with his wife (547-82). It was supported in many significant particulars by corroborative testimony given by disinterested persons of unchallenged integrity (Schonberg 622-46; Harjes 213-30; Forster 654-77; Levinson 611-22; Jaburg 591-611; Ashley 207-13).

Evidence Bearing on the Voluntary Nature of the Petitioner's Confession

Before the petitioner's confession was read into evidence, his attorney challenged its voluntary character and admissibility by calling twelve witnesses for *voir dire* examination concerning the defendant's arrest in Toronto, his return to New York and other events preceding and surrounding the making of the confession. Six of those witnesses gave no evidence now important (Hogan 419-23; Ferguson 437-40; Riendeau 440-3; Green 443-5; Quinn 446-7; McKeon 448-9). The other six were Detective Sergeant Arthur Harris of the Toronto Police Department; Detectives William Prendergast, Nicholas Looram and Acting Captain Daniel J. Mahoney of the New York City Police Department; and Assistant District Attorneys Jacob Grumet and John F. Loehr of New York County. Their testimony may conveniently be divided, according to subject matter, as follows: (a) the petitioner's arrest

and detention in Toronto; (b) his transportation to New York County; (c) the time elapsing between his arrival in New York County and the commencement of his formal confession; (d) his confession; and (e) the nature of the treatment accorded the petitioner from the moment of arrest in Toronto until the completion of his confession.

The petitioner's arrest and detention in Toronto (8 a.m. Monday to 7:30 p.m. Tuesday)

Arrested in Toronto at about eight o'clock Monday morning, October 25 (Harris 427), the petitioner was first taken to a restaurant for breakfast (Harris 431) and then lodged at police headquarters (Harris 427). That evening, from about ten o'clock until midnight, the petitioner was questioned by Assistant District Attorney Loehr and Detective Sergeant Harris, in the presence of a stenographer (Loehr 349-50, 353-4; Harris 431-3; *cf.* statement 240-87).

On Tuesday afternoon he had several brief talks with Detectives Harris, Prendergast and Looram, and with Mr. Loehr (Loehr 357-63; Harris 429, 430, 431, 432; Prendergast 454-7; Looram 510-2), in the course of which he executed a consent to return to New York (Loehr 361; Harris 429, 430; Prendergast 457), as follows (Exh. 26):

> "I desire of my own free will to return to the State of New York, in company with Officers Looram and Prendergast. It has been explained to me that when I arrive in that State a criminal charge may be laid against me, but notwithstanding this, I desire to return to the State of New York."

Before leaving for New York at about 7:30 Tuesday evening, the petitioner had a twenty minute visit with his "aunt and his uncle and his sister," whom the police had notified of his arrest (433, 434).

The trip from Toronto to New York County (7:30 p.m. Tuesday to 5:00 p.m. Wednesday)

The petitioner was taken by train from Toronto to Fort Erie, Canada; by car to Buffalo; and by plane to New York (Loehr 364-6; Prendergast 459-63; Looram 514-9, 525-6). During the entire trip, he was in the custody of Detectives Prendergast and Looram, Mr. Loehr accompanying them as far as Buffalo (Loehr 364-78; Prendergast 459-68; Looram 514-26).

Arriving at Buffalo about 2 a.m. on Wednesday, they spent the next few hours dining and trying to get railroad reservations to New York (Loehr 377; Prendergast 467; Looram 519-20). Unable to get accommodations for the entire group, the detectives took the petitioner to the Statler Hotel where they spent the night and had breakfast (Prendergast 468-9; Looram 520, 523-5), while Loehr continued to New York by train (Loehr 366, 378).

Leaving Buffalo by plane at about one o'clock that afternoon, the detectives and the petitioner arrived at LaGuardia Field at about 4.30 p.m. and reached the office of the District Attorney of New York County at about five o'clock (Prendergast 475; Looram 525-7).

The petitioner was subjected to no questioning about the crime during the trip from Toronto to New York (Prendergast 461, 474, 475; Looram 528; see also Loehr 375-6). Moreover, apart from some of the time spent in his hotel room in Buffalo (Prendergast 469; Looram 524-5), the petitioner was not handcuffed, but was allowed to assume the appearance of an ordinary traveler (Prendergast 466, 467).

Time elapsing between the petitioner's arrival at the District Attorney's Office and the commencement of his confession (5:00 p.m. Wednesday to 2:45 p.m. Thursday)

Upon arrival at the District Attorney's Office in New York County, the petitioner was immediately given a medical examination which lasted about twenty minutes (Loehr 382; Prendergast 477; Looram 527; Mahoney 537). As soon thereafter as he had dressed, he was questioned by Assistant District Attorney Grumet for a period of time variously estimated as lasting from three-quarters of an hour to about two hours [Grumet 309 ("about three-quarters of an hour"); Prendergast 479 ("approximately an hour"); Looram 529 ("About two hours"); Mahoney 537-8 ("about an hour or thereabouts")], after which he was taken to another room and given his supper (Prendergast 481, 485; Mahoney 539).

Between the conclusion of this first questioning and 2:45 the next afternoon, when he started to give his formal confession, the petitioner was interrogated twice by Mr. Grumet and three times by Mr. Loehr. Grumet's interrogations occurred "on and off" for a total of about two hours between about ten o'clock Wednesday evening and two o'clock the next morning (Grumet 316-7, 318); and for about "Half hour or so" some time between 2 and 4 a.m. on Thursday (Grumet 320-1). Loehr questioned the petitioner for "About a half an hour" at ten o'clock Thursday morning, in the presence of Detectives Prendergast and Looram (Loehr 386-8); between "half and three-quarters of an hour" shortly after eleven o'clock, in the presence of these same detectives (Loehr 388-9); and "alone" with the petitioner "for almost an hour" beginning at about one o'clock Thursday afternoon (Loehr 396).

In addition, he was placed in a lineup for identification purposes at about 11 p.m. on Wednesday (Loehr 384; Prendergast 484; Looram 532; Mahoney 540; Grumet 336),

and was, from time to time, the object of desultory questioning by the detectives as they proceeded about their duties in connection with the case (Prendergast 483; *cf.* Looram 530).

While they were not questioning the petitioner, Assistant District Attorneys Grumet and Loehr were either engaged in questioning other witnesses and investigating other aspects of the case, or were at their homes (Grumet 313, 317, 318-20; Loehr 386-7), while the police officers—who were never off duty from the time of the discovery of the murder until after the petitioner's arraignment (Prendergast 482; Mahoney 542)—were occupied with other problems in connection with the investigation (Mahoney 536-7). During such times, the petitioner was left alone save for a guard (Prendergast 483) and was variously observed "either standing up gazing out the window or sitting" (Prendergast 484; Looram 531).

The Confession

During the questioning by Grumet and the early questioning by Loehr the petitioner made no admissions of guilt, but adhered substantially to the denials and explanations contained in the Toronto statement (Grumet 333-4; *cf.* Loehr 404). However, during his 11 a.m. interview with Loehr, he began to ask "about the definitions of the different degrees" of homicide (Loehr 406, 412). The pertinent sections of the Penal Law were then "pointed out to him" (Loehr 406, 407, 411-2) with the explanation that, since the petitioner was the "only one in the room" at the time of the murder, no one knew of what degree of homicide he was guilty and "his story held the key to the whole situation, that no one would know it until he told it" (Loehr 417).

About an hour after this (406), the petitioner asked to speak "alone" to Mr. Loehr, and his request was

granted (Loehr 396, 416). Loehr then told the petitioner that Mr. Grumet and Captain Mahoney were "disgusted" with his "degrading" story about sodomous relations with a soldier, and that they did not think that "Lonergan had one shred of decency in his whole make-up" (Loehr 404). Loehr told him, however, that, knowing that "Lonergan had been educated in a Catholic school," he was sure that he must have acquired at least "one shred of decency or one redeeming trace in his make-up" (405) and that it was up to him to show

> "the benefit of his Catholic training and do at least one thing to save this whole situation, and * * * tell the truth and eliminate this Murray Wooster [the soldier] alibi story, with all its degrading results and effects" (Loehr 405).

Loehr told the petitioner that he himself "had been through the Catholic schools" and displayed his Fordham diploma as verification (Loehr 405).

Immediately after this interview, and after admitting that he understood "fully and clearly" that anything he might say could be used against him "in the future before a grand jury or before a trial jury" (confession 547), and acknowledging that he was willing to tell "the truth" as he had told it to Loehr "a short while ago" (confession 547), the petitioner made his formal confession giving, in his own words, a detailed account of the murder (Grumet 322-4; Loehr 410-1; Prendergast 488-9; Looram 532-3; see also, confession 546-82). As his story unfolded, he was at no time asked to change any statement he made or to frame his answers according to the wishes of his questioners (Prendergast 488, 489, 493; see, also, Vaccaro 584).

The petitioner was not asked to sign his confession, as it had not been transcribed at the time of his arraignment (Grumet 326).

The nature of the petitioner's treatment from the moment of arrest to completion of his confession

1. As to food and sleep

The petitioner was given breakfast immediately after his arrest in Toronto; was fed at all times during his detention there (Harris 431); was given dinner upon his arrival in Buffalo (Loehr 377; Prendergast 467); ate a "Very hearty" breakfast at the Hotel Statler the next morning (Prendergast 463); and, in the District Attorney's Office—pursuant to Mr. Grumet's instructions to "see that he gets whatever he wants to eat" (Mahoney 539)—he was given food "whenever he asked for it" (Grumet 327-8; Prendergast 481, 485-6; Mahoney 539, 543).

The petitioner was asleep at Toronto police headquarters when first seen by Mr. Loehr (Loehr 412); he "slept * * * all night" during his detention in Toronto (Harris 431); and for "about four hours" while at the Hotel Statler in Buffalo (Prendergast 463, 474). Like the detectives, he got no sleep after his arrival in New York City (Prendergast 482; see Grumet 323; Loehr 412). As to that, however, he made no complaint (Grumet 315).

2. As to intoxication

The petitioner was "perfectly sober" upon his arrival at the District Attorney's Office and at all times thereafter (Grumet 308; Loehr 412, 413; Prendergast 485; Looram 516, 531). The only liquor consumed by him between the time of his arrest on Monday morning and the completion of his confession Thursday afternoon was a half pint of his own brandy, which he shared with the detectives during the train trip from Toronto to Fort Erie on Tuesday evening—two days prior to the confession (Loehr 413; Prendergast 469-73; Looram 516, 525-6).

3. As to threats and promises

The petitioner was not threatened that, if he failed to confess, he would be prosecuted for sodomy or any other crime or that publicity would be given to his homosexual activities; nor was he promised immunity from such prosecution or publicity as a reward for confessing (Grumet 309, 311; Loehr 401, 405, 408-9, 417; Prendergast 460-1, 474, 479, 482-3; Looram 514, 528; Mahoney 538-9, 540). It was never suggested to him that, if he confessed, he might be allowed to plead guilty to some lesser degree of homicide (Loehr 408-9, 417).

4. As to abuse or harassment

At no time during his detention "was the defendant abused, threatened, or in any way harassed" (Grumet 309, 330; Loehr 355, 398; Harris 430, 433; Prendergast 457, 461; Looram 528-30, 532; Mahoney 538-9, 540). He was never refused advice of counsel; indeed, he never asked leave to consult an attorney (Grumet 329-30; Loehr 357; Harris 428).

ARGUMENT

No constitutional right of the petitioner was violated by the trial court's ruling admitting his confession in evidence.

The petitioner's contention that the admission of the confession in evidence violated his constitutional rights, appears to rest upon the assumption that it was obtained while the petitioner was "held incommunicado and questioned by relays of inquisitors" (Petition and Brief, p. 16) in the manner condemned by this Court in *Ashcraft* v. *Tennessee* (1944) 322 U. S. 143. Nothing could be further from the truth.

The petitioner was not held *incommunicado* and was not denied the right to counsel. On the contrary, during

his detention in Toronto he visited with relatives (434), and he never asked to see any lawyer, other relative or friend (329-30, 357, 428). In this connection, it is significant that, although his visit with members of his family took place long after the cause of his arrest had been fully explained to him and he was thus given every opportunity to send for an attorney if he wanted one, there is no suggestion in the record that any lawyer ever attempted to gain access to him prior to arraignment. This, of course, buttresses the affirmative testimony of the *voir dire* witnesses that, in fact, he never requested legal counsel [see *People* v. *Shilitano* (1916) 218 N. Y. 161, 164; *People* v. *Leonardo* (1910) 199 N. Y. 432, 446].

Nor was the petitioner subjected to questioning "by relays of inquisitors." The uncontradicted testimony is that, during the twenty-two hours elapsing between his arrival at the District Attorney's Office and the commencement of his formal confession, he was examined—only intermittently—for periods totalling seven hours at the most (*supra*, pp. 6-7). Further, during the intervals between these periods of questioning, he was subjected to no harassing tactics of any nature. On the contrary, left alone save for a guard, he spent his time either eating or "standing up gazing out the window or sitting" (*supra*, p. 7).

Indeed, the only circumstance upon which a claim of duress might conceivably have been based is the fact that the petitioner was not arraigned immediately upon his arrival in New York County, but was detained in the District Attorney's Office while the law enforcement officials—by questioning him and other witnesses—completed their investigation of the case. That consideration, however, was repeatedly and forcibly brought to the attention of the jury by the trial court's charge. Not only did the court peremptorily instruct the jury to acquit the petitioner unless they found beyond a reasonable doubt that his alleged confession was wholly voluntary (895-6, 897,

916), but it specifically advised them that, in coming to a decision "on the question as to whether or not the alleged confession was a voluntary one" (906), they might consider any delay in arraignment (893-4, 906, 914, 916). Thus, in response to a request from the petitioner, the trial court told the jury (906):

> "I have already charged the jury, and I will charge them again, that the failure to arraign the defendant from the time he was brought to New York, which was Wednesday, until Friday, October 29th, in the morning, may be considered by them on the question as to whether or not the alleged confession was a voluntary one.
>
> "And of course, voluntary means free, it means not by compulsion, a free confession is a confession which is not made under threat, duress, a condition of the mind which is free and unconstrained, that is what voluntary means."

In view of the foregoing instructions, there can be no question that the jury affirmatively found beyond a reasonable doubt that the confession was "not made under threat [or] duress" but that the petitioner confessed when he was in "a condition of the mind which * * * [was] free and unconstrained."

Nothing said or decided in *Ashcraft* v. *Tennessee*, *supra*, 322 U. S. 143, raises any doubt as to the propriety of the conviction herein. Ashcraft, arrested one Saturday evening, was taken to the county jail, placed "with a light over his head" in a room "equipped with all sorts of crime and detective devices such as * * * high-powered lights," and subjected to continuous and virtually uninterrupted questioning for thirty-six hours before (322 U. S., p. 149), on the following Monday morning, he allegedly confessed (*id.*, pp. 151-152). Although the thirty-six hour quizzing to which he was thus subjected was so intense that the officers conducting it became exhausted and had to work "in relays," the defendant himself,

except for a "single five minutes' respite" was never given a moment's relief from this "continuous stream of questions" (*id.*, p. 149).

In such circumstances, this Court in an opinion calling sharp attention to the general weakness of the evidence of guilt (*id.*, at pp. 148-153), the inadequacy of the trial judge's charge (*id.*, pp. 146-148), and the "hopeless conflict" existing in the testimony (*id.*, pp. 149-150), concluded that the situation disclosed was "so inherently coercive" as to render use of the confession so obtained a violation of the accused's rights under the Fourteenth Amendment (*id.*, pp. 154-155).

It is patent from the evidence already discussed (*supra*, pp. 4-10), that the situation at bar is not even remotely analogous to that in the *Ashcraft* case. Instead of being taken to the county jail and placed "with a light over his head" in a room "equipped with all sorts of crime and detective devices such as * * * high-powered lights," this petitioner was questioned in an ordinary lawyers' room in the District Attorney's Office [*cf.* 3 Wigmore *On Evidence* (3d ed. 1940) §851, p. 320]. Instead of being examined virtually continuously for thirty-six hours by officers working "in relays," this petitioner was questioned intermittently for a maximum of seven hours over a total period of twenty-two hours. Consequently, instead of being permitted only a "single five minutes' respite" from his questioning, this petitioner's periods of "respite"—during which he was in no way harassed and was given food "whenever he asked for it" (485)—far exceeded his periods of interrogation. Moreover, there is no "hopeless conflict" in the evidence at bar. On the contrary, the facts outlined above stand uncontradicted in the record.

The facts in *Lyons* v. *Oklahoma* (1944) 322 U. S. 596, and *Malinski* v. *New York* (1945) 324 U. S. 401, the other cases relied upon by the petitioner, are so disparate from those at bar that they do not warrant discussion.

Conclusion

The petitioner was convicted after a scrupulously fair trial. No constitutional question is presented by the trial court's ruling admitting the petitioner's confession in evidence.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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